86 - 1225

Supreme Court, U.S.
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No. _____

In the

Supreme Court of the United States

October Term, 1986

ROBERT L. KRAUSE,

Petitioner,

vs.

MARK K. KIM, M.D. d/b/a
MARK K. KIM, M.D., P.A.
and METROPOLITAN MEDICAL CENTER, a
corporation,

LAWRENCE A. FARBER, M.D. and NORAN
NEUROLOGICAL CLINIC, P.A.,

Respondents.

BRIEF IN OPPOSITION OF RESPONDENT METROPOLITAN MEDICAL CENTER TO PETITION FOR A WRIT OF CERTIORARI TO THE MINNESOTA COURT OF APPEALS

* Richard P. Mahoney
Keith A. Dunder
David E. Kuntz
MAHONEY, DOUGHERTY & MAHONEY
801 Park Avenue
Minneapolis, Minnesota 55404
(612) 339-5863
Attorneys for Respondent
Metropolitan Medical Center

* Counsel of Record

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QUESTION PRESENTED

Where petitioner, whose claim was previously dismissed with prejudice for failure to comply with a discovery order, thereafter filed an untimely appeal of the dismissal to the Minnesota Appellate Courts, which appeal was dismissed as untimely; and where petitioner thereafter brought a motion in the trial court to vacate the trial court's dismissal pursuant to the Minnesota Rules of Civil Procedure, which motion was denied upon independent and adequate state grounds; and where the petitioner thereafter petitioned the Supreme Court of Minnesota for rehearing, which petition was denied on state grounds, should his petition for a Writ of Certiorari properly be denied?

TABLE OF CONTENTS

Page

QUESTION PRESENTED.....i

TABLE OF AUTHORITIES.....ii

STATEMENT OF CASE.....1

SUMMARY OF ARGUMENT.....5

ARGUMENT.....6

CONCLUSION.....9

APPENDICES.....11

TABLE OF AUTHORITIES

Cases Page

Herb v. Pitcairn, 324 U.S. 117, 125 (1954).....8

Webb v. Webb, 451 U.S. 493; 101 S.Ct. 1889 (1981).....7

Federal Statutes:

Title 28 §1257(3).....6,9

Supreme Court Rules:

Rule 21.1(h).....7,8,9

No. 86-1225

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

Robert L. Krause,

Petitioner,

vs.

Mark K. Kim, M.D., d/b/a Mark K. Kim, M.D., P.A.,Metropolitan Medical Center, a corporation, Lawrence A. Farber, M.D. and Noran Neurological Clinic, P.A.

Respondents.

BRIEF IN OPPOSITION OF RESPONDENT METROPOLITAN MEDICAL CENTER TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

STATEMENT OF THE CASE

Plaintiff, Robert Krause, brought

the above action against Metropolitan Medical Center on December 23, 1981, claiming damages for this defendant's alleged negligence in December of 1979. Approximately five years later, this defendant brought a motion to compel answers to interrogatories pertaining to experts and on January 21, 1985, the trial court (Hennepin County District Court) ordered that plaintiff's complaint would be dismissed with prejudice in the event that he failed to answer the interrogatories propounded within twenty (20) days of the date of said order.

Krause did not comply with the court's order in that, first, he did not respond to the interrogatories within the twenty-day period ordered by the court, and second, the untimely response notwithstanding, Krause later did

"respond," but in a manner ruled by the trial court to be incomplete and non-responsive. Under Minnesota Rules of Civil Procedure 37.01(3), such an incomplete response is deemed to be a failure to answer. Accordingly, on February 28, 1985 defendant Metropolitan Medical Center filed a motion to dismiss for failure to comply with the previous court order concerning discovery and filed a supporting affidavit therewith, attaching plaintiff's "response" to the discovery order. Thereafter, on May 14, 1985, the trial court entered its order dismissing plaintiff's complaint against defendant Metropolitan Medical Center, with prejudice. (See Appendix A)

The plaintiff then appealed the trial court's dismissal of his complaint against Metropolitan Medical Center to the Minnesota Court of Appeals on

October 24, 1985. This appeal was untimely, as it was filed more than 90 days after the entry of judgment against plaintiff, in contravention of Rule 104.01 of the Minnesota Rules of Civil Procedure. Accordingly, the Minnesota Court of Appeals entered its order on November 19, 1985 dismissing Mr. Krause's appeal out of hand, as untimely. (See Appendix B)

Plaintiff then brought a motion before the trial court which had originally heard his case seeking to vacate the judgment of dismissal entered in favor of defendant Metropolitan Medical Center and attempting to re-argue matters which had previously been submitted to the trial court and had subsequently been appealed to the Minnesota Court of Appeals. On March 20, 1986, the trial court, upon

reviewing the entire file, denied plaintiff's motion for rehearing. (See Appendix C)

Thereafter, the plaintiff appealed to the Minnesota Supreme Court pursuant to Rule 140 of the Minnesota Rules of Appellate Procedure requesting reconsideration of the denial of further review. On September 22, 1986, the Supreme Court of the State of Minnesota declined to grant further review, and also denied petitioner's motion for a rehearing. No federal questions were addressed. Petitioner now seeks relief from this Court.

SUMMARY OF ARGUMENT

The orders below are not properly reviewable by this Honorable Court on Writ of Certiorari, as they rest on independent and adequate state grounds and are based solely upon issues of

state law. Additionally, no federal question has been properly raised by petitioner, and the issues involved are not sufficiently important to warrant this Court's attention.

ARGUMENT

Petitioner attempts to involve this Court's jurisdiction pursuant to 28 U.S.C. §1257(3). The phrase "Any title, right, privilege or immunity ... especially set up or claimed under the Constitution" appears to be the portion of the statute petitioner looks to in an attempt to come within the purview of 28 U.S.C. §1257(3).

Petitioner has not, however, raised <u>any</u> federal question to the trial court or in the Minnesota Appellate process, and, even if he had, has failed to appropriately specify how he has done so in his Petition for Certiorari herein.

Rule 21.1(h), Supreme Court Rules, mandates that petitioner specify with particularity in his Petition for Certiorari

> "the stage in the proceedings, both in the court of first instance and the Appellate Court, at which the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed upon by the court; such pertinent quotation of specific portions of the record, or summary thereof, with specific reference to the places in the record where the matter appears (e.g., ruling on exception, portion of court's charge and exception thereto, assignment of errors) as will show that the federal question was timely and properly raised so as to give this Court jurisdiction to review the judgment on writ of certiorari."

The United States Supreme Court jurisdiction will not arise unless a federal question has been adequately raised and preserved at the state court level. Webb v. Webb, 451 U.S. 493; 101 S.Ct. 1889 (1981). Accordingly, since no federal question was, in fact, raised

to the trial court or on appeal, and since no federal question has been set forth in petitioner's Petition for Certiorari which remotely complies with Rule 21.1(h), Supreme Court Rules, this Honorable Court does not have jurisdiction to hear this appeal and the petition should be denied. Id.

The petition and the issues sought to be raised therein are not entirely clear to this respondent. What is clear, is that any decision for which petitioner could possibly be seeking review was decided on independent and adequate state grounds and solely on the basis of state law. Since each and every decision of the courts below rests on a matter of state law, no basis can be found for review by this court. Herb v. Pitcairn, 324 U.S. 117, 125 (1954). In either event, no basis for review by

this court has been set forth in the petition.

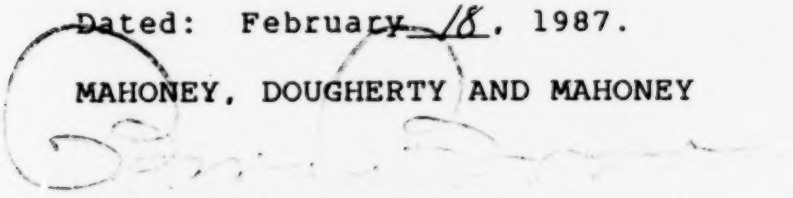
CONCLUSION

Whatever decisions below petitioner complains of are matters of state civil procedure resting solely on state law. No federal question has been raised or ruled upon by any court below, and no federal question has been properly set forth in the petition as required by Rule 21.1(h), Supreme Court Rules. This court lacks jurisdiction over this matter pursuant to 28 U.S.C. §1257(3).

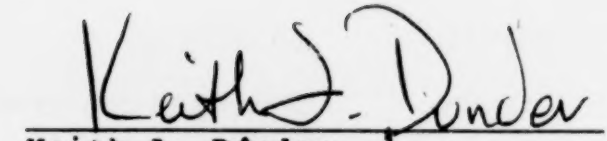
For the foregoing reasons, respondent Metropolitan Medical Center, respectfully requests that the Court deny the petition for Writ of Certiorari.

Dated: February 18, 1987.

MAHONEY, DOUGHERTY AND MAHONEY



Richard P. Mahoney
ID #6662X (MINN.)



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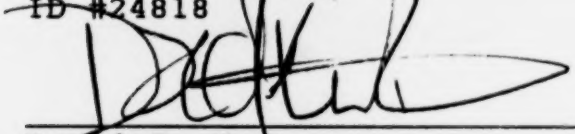

David E. Kuntz
ID #133152
Attorneys for Respondent
Metropolitan Medical Center
801 Park Avenue
Minneapolis, Minnesota 55404
612/339-5863

BEST AVA

APPENDIX A

STATE OF MINNESOTA DISTRICT COURT

COUNTY OF HENNEPIN FOURTH JUDICIAL DISTRICT

Robert L. Krause, File No. 801270

Plaintiff,

-vs- ORDER

Mark K. Kim, M.D., d.b.a Mark K. Kim, M.D., P.A., and Metropolitan Medical Center, a Minnesota non-profit corporation,

Defendants.

On January 21, 1985, the undersigned ordered that plaintiff's Complaint would be dismissed with prejudice if he failed to answer the expert interrogatories of defendant Metropolitan Medical Center within 20 days. Counsel for Metropolitan Medical Center has submitted an Affidavit attesting to the fact that its expert interrogatories

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have not been properly answered and that no medical witness has been identified by the plaintiff.

THEREFORE, IT IS HEREBY ORDERED that the plaintiff's Complaint against Metropolitan Medical Center is hereby dismissed with prejudice and that judgment be entered in favor of Defendant Metropolitan Medical Center and against plaintiff, dismissing plaintiff's Complaint with prejudice and with costs.

BY THE COURT:

/s/ Robert E. Bowen
Judge of District Court

Dated: May 14, 1985.

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EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

APPENDIX B

STATE OF MINNESOTA

IN COURT OF APPEALS

#CO-85-1992

Robert L. Krause,

Appellant,

vs. O R D E R

Mark K. Kim, M.D., d.b.a.
Mark K. Kim, M.D., P.A.,

Defendant,

Metropolitan Medical Center,

Respondent.

Considered and decided by Popovich, Chief J., Randall, J. and Crippen, J.

Based upon the file, records and proceedings herein, and because:

1. Appellant brought a medical malpractice suit in 1981 but failed to identify an expert witness; and

2. In January 1985 the trial court ordered appellant to identify a witness

under pain of dismissal; and

3. Appellant seeks review of the resulting July 25, 1985 judgment of dismissal; and

4. Appeal from a judgment must be taken within 90 days after entry of judgment, Minn. R. Civ. App. P. 104.01; and

5. This appeal was filed and served on October 24, the 91st day from entry of the judgment; and

6. Respondent moves to dismiss the appeal as untimely taken; and

7. This court may not extend the time for filing of a notice of appeal, Minn. R. Civ. App. P. 126.02; and

8. Respondent's reply affidavit, which was not signed, but was notarized, was disregarded by this court in consideration of the motion;

IT IS HEREBY ORDERED the appeal is dismissed.

Dated: 11/19/85

BY THE COURT

/s/
Chief Judge

CLL:mbs

APPENDIX C

STATE OF MINNESOTA DISTRICT COURT

COUNTY OF HENNEPIN FOURTH JUDICIAL DISTRICT

Robert L. Krause, File No. 801270

Plaintiff,

-vs-

Lawrence A. Farber, M.D. and Noran Neurological Clinic, P.A.,

Defendants.

Robert L. Krause, File No. 785809

Plaintiff,

-vs-

Mark K. Kim, M.D., d/b/a Mark K. Kim, M.D., P.A., and Metropolitan Medical Center, a Minnesota non-profit corporation,

Defendants.

The above-entitled matter came on

for hearing before the undersigned on March 20, 1986, on the Motion of plaintiff for a rehearing of the Motions argued December 27, 1984, herein and for relief from the Judgments entered herein pursuant to this Court's Order of January 21, 1985.

Plaintiff appeared pro se. Robert E. Salmon, Esq., appeared on behalf of defendants Farber and Noran Neurological Clinic. Donna J. Blazevic, Esq. appeared on behalf of defendant Kim. Keith A. Dunder, Esq., appeared on behalf of defendant Metropolitan Medical Center.

The Court has considered the Memoranda and arguments of the parties and counsel, and has reviewed the entire file. Accordingly, the Court is fully advised, and

IT IS HEREBY ORDERED that plaintiff's Motion is in all respects denied.

/s/ Robert E. Bowen
Robert E. Bowen
Judge of District Court

DATE: March 21, 1986.

MEMORANDUM

The Court has carefully considered all of the arguments advanced by plaintiff in support of his Motion, and finds that they are without merit. These actions have been dismissed with prejudice by this Court, and the judgments of dismissal were appealed and affirmed by the Minnesota Court of Appeals, and the Minnesota Supreme Court has declined to grant further review. Accordingly, this Court considers these matters closed.

Robert E. Bowen

APPENDIX D

STATE OF MINNESOTA

IN SUPREME COURT

C4-86-743

Robert L. Krause,

Appellant,

-vs-

Mark K. Kim, M.D.,
d.b.a. Mark K. Kim,
M.D., P.A.,

Respondent,

Metropolitan Medical
Center,

Respondent,

Lawrence A. Farber,
M.D., et al,

Respondents.

ORDER

Based upon all the files, records and proceedings herein,

IT IS HEREBY ORDERED that Robert L. Krause's motion for reconsideration of the denial of the petition for further

review be, and the same is, denied.

IT IS FURTHER ORDERED that respondents' motions for attorney fees be, and the same are, denied.

Dated: September 22, 1986.

BY THE COURT:

_____

Chief Justice